No. 83-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DON HALSELL,

Petitioner,

VS.

LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN; TEXAS STATE CONFERENCE OF BRICKLAYERS & ALLIED CRAFTSMEN; INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF THE INTERNATIONAL UNION AND TEXAS STATE CONFERENCE

MARSHA S. BERZON*
ALTSHULER & BERZON
177 Post Street, Suite 600
San Francisco, CA 94108
Telephone: (415) 421-7151

WILLIAM G. BAAB
MULLINAX, WELLS, BAAB & CLOUTMAN
8204 Elmbrook Dr.
Dallas, Texas 75247
Attorneys for International Union

WILEY DORAN
DORAN & MITCHELL
1010 Jefferson, Suite 820
Houston, Texas 77002
Attorney for Texas State Conference

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-6500

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STATEMENT OF THE CASE

Petitioner Don Halsell has been for many years Chief Executive Officer of the Brick Institute of Texas, a trade organization of brick manufacturers. While he has also been, for over twenty-five years, a member of one or another local affiliated with the International Union of Bricklayers and Allied Craftsmen and the Texas State Conference of Bricklayers & Allied Craftsmen (hereafter "the Unions"), he "has not made his living by laying bricks for

about 20 years." Appendix to Petition for Writ of Certiorari ("Pet.App."), A-3.

The Brick Institute of Texas wishes to promote the sale and use of brick construction . . . regardless of whether the layers are union or non-union." Pet.App.A-4. The Unions, on the other hand, have, as petitioner himself testified at trial, a goal of "promot[ing] union shop jobs"—that is, ensuring that so far as possible all bricklaying jobs are performed by union members. Tr.87. For this reason, as petitioner also acknowledged, the unions have traditionally declined to teach bricklaying skills to "anybody that comes along" (Tr. 93), preferring instead "that apprenticeship programs should be run under the union's apprenticeship program so that the graduates will be (1) limited in number and (2) union members." Pet.App.A-7. On at least one occasion previous to the present one petitioner was involved in a dispute with another Bricklayers' local over the training of non union apprentices. Pet.App.A-4.[1]

Despite his awareness of the Union's position on apprenticeship training, petitioner began teaching bricklaying skills to a group of "open shop" apprentices—that is, individuals who worked during the day for non-union contractors—at a time when a parallel class of union apprentices sponsored by a Bricklayers' local was being conducted at the same time in the same high school building. Tr.115. For doing so he was charged with and fined for violating Code 5

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[1]In addition, petitioner knew that the Texas State Conference Constitution prohibited members from "further[ing] the interests of firms, corporations, manufacturers, public or private schools by teaching laborers, convicts, or any person other than regularly indentured apprentices the trade of masonry." Pl.Ex.44.

§ 1(s) of the International Union Constitution, the provision he now seeks to challenge.[2]

Throughout this litigation petitioner has conceded that he in fact taught the non-union apprenticeship class as charged. He contends, however, that under § 101(a)(5) of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(5), the union had an obligation to provide explicit prior notice, in writing, of the basic union creed that taking actions which render the employment prospects of union members less secure and their ability to maintain their wages and working conditions more vulnerable to non-union competition is "seriously detrimental" to union interests.

The District Court rejected petitioner's prior notice argument. The Court of Appeals affirmed without opinion, and without expressing its agreement or disagreement with the District Court's reasoning. Instead, the Court of Appeals merely cited in support of its holding two opinions of this Court, *Boilermakers v. Hardeman*, 401 U.S. 233 (1971), and *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982).[3]

ARGUMENT

1. *Boilermakers v. Hardeman*, 401 U.S. 233 (1971), squarely addressed and decided the very contention petitioner raises, in a closely analogous factual context. In

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[2]The section provides that "it shall be an offense . . . for any member . . . to commit any act which is seriously detrimental to the interests of the International."

[3]The *Sadlowski* citation was apparently in response to an argument petitioner has now abandoned—that the act of teaching a non-union apprenticeship class is protected under the free speach provisions of the Landrum-Griffin Act.

Hardeman, a union member who assaulted an officer was charged with and convicted of violating two different provisions of the union constitution. One expressly prohibited force against union officers; the other, quite similar to the provision here at issue, generally proscribed acts which "create dissension among the members or . . . work[ ] against the interest and harmony of" the union. 401 U.S., at 236 & n.3. The case turned on the validity under § 101 (a)(5) of the Landrum-Griffin Act of the conviction on the second, broader ground.[4]

To determine this issue, *Hardeman* reviewed in detail the legislative history of § 101(a)(5):

> Section 101(a)(5) began life as a floor amendment to S.1555, the Kennedy-Ervin Bill, in the 86th Congress. As proposed by Senator McClellan, and as adopted by the Senate on April 22, 1959, the amendment would have forbidden discipline of union members "except for breach of a published written rule of [the union]," 105 Cong.Rec. 6476, 6492-6493. But this language did not long survive. Two days later, a substitute amendment was offered by Senator Kuchel, who explained that further study of the McClellan amendment had raised "some rather vexing questions." *Id.*, at 6720. The Kuchel substitute, adopted the following day,

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[4] It was assumed by both the majority and the dissent (although not by Justice White, concurring (401 U.S., at 247)) that because the union verdict was general, the undisputed validity of the conviction on the specific assault ground was not relevant to the § 101(a)(5) issue. 401 U.S., at 242; *id.*, at 252 (Douglas, J., dissenting). Thus, petitioner simply ignores the setting of *Hardeman* in suggesting (Petition, at 8) that the existence of a separate union rule on assaults was determinative in that case; if it had been, there would have been no reason for the Court to decide the § 101(a)(5) issue at all.

deleted the requirement that charges be based upon a previously published, written union rule; it transformed Senator McClellan's amendment, in relevant part, into the present language of § 101(a)(5). *Id.*, at 6720, 6727. As so amended, S.1555 passed the Senate on April 25. *Id.*, at 6745. Identical language was adopted by the House, *id.*, at 15884, 15891, and appears in the statute as finally enacted.

The Congress understood that Senator Kuchel's amendment was intended to make substantive changes in Senator McClellan's proposal. Senator Kennedy had specifically objected to the McClellan amendment because

> "In the case of • • • the • • • official who bribed a judge, unless there were a specific prohibition against bribery of judicial officers written into the constitution of the union, then no union could take disciplinary action against [an] officer or member guilty of bribery.
>
> • • •
>
> "It seems to me that we can trust union officers to run their affairs better than that." *Id.*, at 6491.

Senator Kuchel described his substitute as merely providing "the usual reasonable constitutional basis" for union disciplinary proceedings; union members were to have "constitutionally reasonable notice and a reasonable hearing." *Id.*, at 6720. After the Kuchel amendment passed the Senate, Senator Goldwater explained it to the House Committee on Labor and Education as follows:

> "[T]he bill of rights in the Senate bill requires that the union member be served with written specific charges prior to any disciplinary proceedings but it does not require that these charges, to be valid, must be based on activity that the union had

> proscribed prior to the union member having engaged in such activity." Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., pt. 4, p.1595 (1959).
>
> And Senator McClellan's testimony was to the same effect. *Id.*, pt. 5, pp.2235-2236, 2251, 2285.
>
> 401 U.S., at 243 (emphasis supplied).

From this sequence, *Hardeman* concluded that as far as the Landrum-Griffin Act is concerned, "a union may discipline its members for offenses not proscribed by written rules at all." 401 U.S., at 245.[5] Thus, this Court in *Hardeman* answered directly, comprehensively, and with full awareness of the legislative materials the very issue petitioner seeks to present.

2. Petitioner, then, is simply requesting reconsideration of *Hardeman*. The reasons he offers, however, for ignoring basic principles of *stare decisis* fall far short of the compelling showing such a departure requires.

For example, in alluding to "constitutionally reasonable notice," Senator Kuchel was plainly referring to the quite separate notice requirement which *is* included, explicitly, in § 101(a)(5)—namely, the requirement that before a disciplinary hearing, a member must be "served with written specific notice," (§ 101(a)(5)(A)) so that he is not "prejudiced in the presentation of his defense." *Hardeman, supra*, 401 U.S., at 245. Further, the comment of Senator McClel-

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[5] As *Hardeman* noted (401 U.S., at 244 n.11), state law may well provide some form of prior notice protection in union disciplinary proceedings, and the 1959 Congress was so informed.

lan to which petitioner alludes (Petition, at 4-5), occurred during the debate on Senator McClellan's *original* amendment *before* the Kuchel substitute was introduced. That substitute, however, was not designed simply to recast the McClellan amendment in different language. Instead, "[i]t was designed to remove the 'extremes raised by the [McClellan] amendment', 105 Cong. Rec. 6721 (1959), 2 Leg. Hist. 1234 (Sen. Cooper), and to assure that the amendment would not 'unduly harass and obstruct legitimate unionism'. 105 Cong. Rec. 6722 (1959), 2 Leg.Hist. 1233 (Sen. Church)." *Steelworkers v. Sadlowski, supra,* 457 U.S., at 110. The very point of the *Hardeman* analysis of the legislative history of § 101(a)(5) is that the deletion of the language in § 101(a)(5) concerning previously published written union rules *did* represent a conscious Congressional decision to abandon Senator McClellan's concern with the precision of disciplinary provisions, for fear of interfering with "legitimate unionism." Consequently, to "find[] . . . by construction [the] broad policy [for which petitioner argues]" would be unjustifiably to ignore the fact that "those interested in just such a condemnation were unable to secure its embodiment in enacted law." *NLRB v. Drivers Local Union No. 639,* 362 U.S. 274, 290 (1960). This the *Hardeman* Court properly refused to do.

Finally, petitioner's argument studiously ignores the language of § 101(a)(5). That language does not broadly protect union members' right to "due process". Instead, it is limited to assuring three *particular* procedural protections encompassed within the constitutional due process guarantee. Thus, just as "there is absolutely no indication

that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment . . . [especially in light of the § 101(a)(2)] proviso covering 'reasonable rules'" (*Steelworkers v. Sadlowski, supra,* 457 U.S., at 111, so there is no statutory basis whatever for a general "due process" guarantee, broader than the specific protections contained within § 101(a)(5).[6]

Consequently, there is no basis at all for reopening the Landrum-Griffin Act issue which *Hardeman* settled. The petition should therefore be denied.

3. Petitioner also suggests that "[t]he decision of the Court of Appeals conflicts with the decision of two other courts of appeal" on the meaning of *Hardeman* (Petition, at 9). It is hard to see how this could be the case, in light of the opaque nature of the Court of Appeals disposition of this case.

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[6]It is worth noting that, in any event, this case is one in which the constitutional cases, if applicable, would find adequate prior notice of the conduct proscribed.

The disciplinary rule proscribed in Code 5, § 1(s) of the International Union Constitution is surely no less precise than the rule that civil servants may be dismissed for "such cause as will promote the efficiency of the service," upheld in *Arnett v. Kennedy,* 416 U.S. 134, (1974). *See also Davis v. Williams,* 617 F.2d 1100 (5th Cir.), *cert. denied* 449 U.S. 937 (1980) (a fireman may constitutionally be discharged under a broad rule prohibiting "conduct prejudicial to good order" for publicly criticizing his city's fire chief). And it is at least as much "hardcore" misconduct (Petition, at 5) in the union context for a union member to promote the employment prospects of avowed non-union members as it is in the military context for a soldier to encourage fellow soldiers not to fight (*Parker v. Levy,* 417 U.S. 733, 757 (1974)).

The Courts of Appeals wrote no opinion at all; instead, it confined itself to citing *Hardeman*. Thus, for all that appears, the Fifth Circuit concurred in the Third Circuit's indication in *Semancik v. United Mine Workers*, 466 F.2d 144 (3rd Cir. 1972), that there may be circumstances in which repeated violations of the free speech provisions of the Act would justify invalidating a broad union constitutional provision. *See also Kuebler v. Cleveland Lithographers & Photographers Union Local 24-4*, 473 F.2d 359, 364 (6th Cir. 1973) (reading *Semancik* as limited to circumstances in which because of "repeated violations of the rights of its members . . . freedom of speech is unreasonably affected by . . . a [broad] provision" in a union's constitution, and then agreeing with *Semancik* on the point).[7] For, since the court below necessarily concluded that there was no free speech violation here *at all* (*see* n.3, supra), its disposition would have been the same had it agreed or disagreed with *Semancik*.

Nor is there any basis for inferring from the Fifth Circuit's silence a conflict between that Court and the Ninth Circuit in *Perry v. Milk Drivers' & Dairy Employees' Union, Local 302*, 656 F.2d 539 (9th Cir. 1981). Contrary to the implication in the Petition (at 9), the decision in *Perry*, like the one here, *upheld* a union disciplinary conviction in the face of a claim that the governing constitutional provisions were too vague. Just as in *Perry* "[n]o unreasonable exercise of intellect was required to see that the instigation and maintenance of unauthorized picketing . . .

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[7]Thus, contrary to petitioner's suggestion (Petition, at 9 & n.3), there is no conflict between *Semancik* and *Kuebler*.

constitutes a violation of the International Constitution and an act of disloyalty"[8] (*id.*, at 539), so here "no unreasonable exercise of intellect was required" to see that training non-union workers to compete with union members for employment would be considered seriously detrimental to union interests. Thus, the Fifth Circuit had no reason to disagree with *Perry* in order to reach its result, and there is no indication that it did so.

Since the disposition of this case by the Fifth Circuit is not in conflict with that of any other Court of Appeals, the second ground proffered in support of granting certiorari has no more merit than the first.

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[8]Two of the constitutional provisions attacked in *Perry* proscribed "[v]iolation of any specific provision of the Constitution or failure to perform any of the duties specified thereunder" and "[v]iolation of the oath of loyalty to the Local Union and the International Union." *Id.*, at 538 n.3.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARSHA S. BERZON*
ALTSHULER & BERZON
177 Post Street, Suite 600
San Francisco, CA 94108
Telephone: (415) 421-7151

WILLIAM G. BAAB
MULLINAX, WELLS, BAAB & CLOUTMAN
8204 Elmbrook Dr.
Dallas, Texas 75247
Attorneys for International Union

WILEY DORAN
DORAN & MITCHELL
1010 Jefferson, Suite 820
Houston, Texas 77002
Attorney for Texas State Conference

**Counsel of Record*